2407

No. 2704

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND TRACTION, LIGHT & POWER COMPANY, a corporation,
Plaintiff in Error,

vs.

CHARLES J. SCHLEIF,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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STATEMENT OF THE CASE

The statement of the case by plaintiff in error is in the main correct but some additional facts appearing in the record should be stated.

1. The north side of the excavation was on a line with the south side of 55th street. Ex. C, 56, 179; Def. Ex. 4.

2. The west side of the excavation extended under the ends of the ties and to within 1.4 feet of the easterly rail. (75, 115, 127).

3. The defendant in error was required to be not only on the north side of the excavation but also to work "around" the same in the performance of his work. (73).

4. There was a plank laying across the edge of the hole for the men to step on so he could hand down the brick and mortar. (137).

5. The car approached within 10 or 12 feet of the defendant in error before ringing its gong. (138, 118, 125).

6. It was being driven at a speed of 15 or 20 miles per hour and was exceeding the ordinance from 3 to 8 miles per hour. It had entirely passed the crossing when stopped and ran from 60 to 80 feet after it struck the defendant in error. (128, 134, 121).

7. The exact cause of the stepping or springing upon the track—if it occurred—is not clear from the evidence, several different versions of the occurrence being given by the several witnsses. (120, 125, 58, 59, 60, 186, 182, 180, 137, 138).

8. If plank were there, they were placed there by the master for the workmen to use in handling the brick and mortar. (132, 138).

9. Five persons present at the street crossing wholly failed to hear any gong or bell sounded until just as the car struck the defendant in error. (135, 138, 59, 118, 125).

10. A man could not have stood between the excavation and the rail. (127-128).

11. The alleged "warrants" received and not returned by the injured man, from the "Insurance Commission" were not "warrants" but simply vouchers which he might sign and return and thereupon warrants would have been sent him. He did not execute them nor were there ever any "warrants" issued to him or any payment made or accepted under the Industrial Insurance Act. (80, 84; Ex. E, F, G).

12. The workman's master was immediately present directing and supervising the work. (136).

ARGUMENT

I

THE COURT DID NOT ERR IN DENYING THE MOTION FOR A DIRECTED VERDICT NOR IN REFUSING TO SUSTAIN THE CHALLENGE TO THE EVIDENCE.

In discussing the case it will avoid confusion if we adopt the suggestion followed by the plaintiff in error and refer to the parties as they were designated in the court below, viz: as "plaintiff" (meaning Schlief) and "defendant" (meaning the Company).

THE VERDICT NEGATIVES ANY CONTRIBUTORY NEGLIGENCE

The unanimous rule in the Federal courts as in the State of Washington, is, that in an action to recover for injuries by being run over (or struck) by a street car, contributory negligence of the plaintiff is a defense, to be proved by the defendant.

> *Washington & G. R. Co. vs. Gladman,* 15 Wall 401.
>
> "The burden of proving contributory negligence rests on the defendant and it will not avail him unless it has been established by a preponderance of the evidence."
>
> *Union P. R. Co. vs. O'Brien,* 161 U. S. 451.
>
> *Norman vs. Bellingham,* 46 Wash. 205.

Where the evidence is at all conflicting upon the facts, the question of contributory negligence is exclusively for the jury.

Wash. & G. R. Co. vs. McDade, 135 U. S. 554.

Gunderson vs. Bieren et al, 38 Wash. Dec. 350 (July, 1914).

Morgan vs. Rainier Beach Co., 51 Wash. 335.

Garretson vs. Tacoma R. & P. Co., 50 Wash. 24.

Whether there were planks placed beside the hole by the employer for the men to stand on in passing down brick—as testified by Krogh, the master (137); or whether the plank were laid down to serve as cross-walks as claimed by Higley (179-80); or whether they were there at all at the time of the accident, as doubted by Schlief (76-77); whether such plank—if there—projected three or four inches, as indicated by Kroon (116-17) or 18 to 24 inches or 12 inches as testified by Higley and Davidson (180-82); whether the planks were three or four feet long and hence ready to teter with only the slightest weight on them beyond the center or were capable of safe use by standing on them almost at the extreme end near the excavation; whether Schlief actually stepped on the plank and it gave way, causing him to spring aside to avoid a fall (120), or whether he "made a misstep" before he stepped on the plank (138); or whether he stepped in front of the car of his own volition and without other impelling cause (117), (125-7), (186); all these are controverted facts and under the rule are for the jury alone and their verdict must be construed most favorably for the injured man.

It may have been that the planks were so placed by the master without due care and being in a dangerous position, negligently so placed by him, the plaintiff stepped on them in the course of his duty relying upon the duty of his master to afford him a safe place to work and safe appliances to work with, and the boards giving made plaintiff spring aside to avoid a fall into the hole and not having heard any warning signal, sprung upon the track, in the sudden emergency, to his injury.

In such a case, the plaintiff could not be charged with the concurring negligence of his master with that of the defendant, but both of them would be liable for his injury.

Being obliged to act instantly, he is not responsible for the error of judgment—if any—and it was not negligence for him to so act. Just how it really occurred was for the jury to say.

Undoubtedly, had the gong been ringing as caution required, it would have attracted his attention and prevented the accident.

> It is a question for the jury, whether it was an unsafe rate of speed without sounding a warning. Defendant's negligence and the contributory negligence of plaintiff, if any, were proper for the jury. The look and listen rule does not apply to those using a street railroad crossing as to the crossing of a steam railroad.

"Deceased might have been led into a feeling of security by reason of the absence of any warning. There is no presumption that the deceased was negligent. On the contrary, the burden is on the defendant to prove it."

Holmgren vs. St. Paul City St. Ry., 63 N. W. 270.

Or, had the car been running at the lawful rate of speed, it would not have been there at that particular moment to inflict the injury.

Knowing that men were at work beside the track, their minds naturally intent on their work, the motorman was charged with the duty to warn them by his gong of his approach and to control his car that such accidents might not happen. Ordinary care and the caution which a reasonably prudent man would use required this.

The plaintiff was upon the street crossing, where the defendant ought to expect to find people crossing its track, and the duty to "look and listen" did not rest upon the plaintiff to the extent of making his failure to do so negligence *per se*.

All the circumstances must be considered, and therefore it was most seemly to submit the whole question of negligence and contributory negligence to the jury under due instructions.

Louis vs. Binghampton R. Co., 54 N. Y. Supp. 452.

Bengivenga vs. Brooklyn H. R. Co., 62 N. Y. Supp. 912.

Burns vs. Second Ave. R. Co., 48 N. Y. Supp. 523.

Smith vs. Bailey, 43 N. Y. Supp. 856.

Diapalo vs. Third Ave. R. Co., 67 N. Y. Supp. 421.

O'Connor vs. Union R. Co., 73 N. Y. Supp. 606.

Houston City Street Ry. vs. Woodlock, 29 S. W. 817.

O'Leary vs. Haverhill St. Ry., 79 N. E. 733.

A recent and pertinent authority is *Chunn vs. City & Suburban Ry.,* 207 U. S. 306 (52 L. Ed. 220).

The rule as to the province of the jury in such cases is well annotated in the foot-note to *N. P. R. Co. vs. Egeland,* 163 U. S. 93, 41 L. Ed. 82.

The decisions of this State are in harmony with our contention.

Tecklenburg vs. Everett Ry., 59 Wash. 387 *et cit.*

Henry vs. Seattle E. Co., 55 Wash. 447.

Keefe vs. Seattle E. Co., 55 Wash. 451.

II

THE NEGLIGENCE OF THE DEFENDANT IS BEYOND QUESTION IN BOTH THE PARTICULARS ALLEGED.

Defendant was running at an unlawful rate of speed as it approached the crossing; it was not sounding any alarm to warn plaintiff of its approach. (118).

Running a car between 11.96 and 17 miles per hour is evidence tending to support a finding that defendant was negligent—the ordinance limiting such speed to 12 miles per hour.

Riley vs. Salt Lake R. T. Co., 37 Pac. 681.

Kumpf places the speed at 15 to 20 miles per hour. (128).

Krogh says the rear of the car passed the crossing—as the car was 36 feet long exclusive of entrance and fender, it must have travelled 50 feet or more before stopping, under the emergency brake. (121), (177), (171).

Hanson says it went 60 or 80 feet before it stopped, after it struck plaintiff. (134).

While all agree that there was nothing to prevent hearing the gong if rung, five men testify that it was not heard till just as the car struck plaintiff.

Plaintiff was seen by the motorman while still 600 or 800 feet away. (173). Yet he came within 20 or 30 feet before ringing his bell, by his own statement. (173).

At a street crossing, running a street car at an excessive speed or without giving proper warning of its approach, is evidence tending to prove negligence. Proof of the distance the car ran with the brake firmly set, after the collision, was evidence tending to prove excessive speed.

Pierce vs. Lincoln Trac. Co., 139 N. W. 656.
Indianapolis S. Ry. Co. vs. Bordenchecker, 70 N. E. 995.

The negligence of the defendant being thus clearly established, the burden is upon the defendant to show, by clear and satisfactory evidence, that plaintiff's negligence occurred and contributed to the injury.

This makes it incumbent to show just what the plaintiff did in the premises and that such acts constituted his own negligence.

If defendant failed to show this to the satisfaction of the jury, they were bound to find for the plaintiff.

Defendant makes no account of the important fact that, if the accident occurred as Krogh and Kumpf say it did, viz: by plaintiff stepping on a tetering board, placed there by Krogh, his master, for his use in his work, it must have occurred through the negligence of Krogh and the defendant concurring; in which case the defendant is liable.

Who can say what action the plaintiff would have taken if the gong had been suitably rung? Which way would he have jumped? Or, would he have jumped at all?

Who can say where the car would have been had it been run at a lawful rate of speed? Clearly it would not have been at the point of the collision at that exact moment, and the plaintiff would not have been struck by it.

At 15 miles per hour, it was travelling 4.4 feet per second, in excess of the lawful distance. At 20 miles per hour it was travelling 11.7 feet per second in excess of the lawful distance.

If the boards were three feet long and projected 1½ feet beyond the edge of the excavation—as claimed by defendant's witnesses Higley and Davidson (180-182), they were just balanced on the edge of the hole and could not have been used, as they had been for hours before the accident. The evidence is not clear as claimed by the defendant. It was then for the jury to determine the facts.

It is undisputed that plaintiff was in the discharge of his duties and that it was incumbent upon him to fix his attention on his work and to pass around, on various sides of the excavation (73), to enable him to reach the mason and deliver his brick as required.

As he could not stand between the rail and the hole, he must from time to time step up on the track or on the concrete between the rail and the hole, and he must rely on the full discharge of the duty devolving on the defendant to warn him of its approaching cars by the usual signal. If he had to be looking out for the cars all the time he would be unable to do his work.

III

DEFENDANT IS NOT EXCUSED BY THE CONCURRENT NEGLIGENCE OF KROGH

If his master had supplied him with a defective instrumentality and in using it he was thrown into a position of danger, it was no fault imputable to plaintiff, and if by the concurring neglect of the defendant, he was there injured, the defendant as well as Krogh are liable to him for his injury.

> "It is a general rule that a person injured by the fault of another, without which fault the

injury could not have occurred, is not to be deprived of his remedy because the fault of a stranger, not in privity with him, also contributed to the injury."

Buswell on Pers. Injuries, Sec. 103 et cit.

Schmidt vs. Transit Co., 120 S. W. 96.

Newcomb vs. Ry., 69 S. W. 348.

Straub vs. St. Louis, 75 S. W. 100.

Harrison vs. K. C. E. L. Co., 93 S. W. 951.

Herdt vs. Koenig, 119 S. W. 56.

Brennan vs. St. Louis, 2 S. W. 481.

Hull vs. K. City, 14 Am. Rep. 487.

Bassett vs. City of St. Jo, 14 Am. Rep. 446.

Fledderman vs. St. Louis T. Co., 113 S. W. 1143.

Pastene vs. Adams, 49 Calif. 88.

Martin vs. North Star Iron Wks., 31 Minn. 410.

Hunt vs. Mo. R. Co., 14 Mo. App. 161.

Lane vs. Atlantic Works, 107 Mass. 108.

Jacksonville R. Co. vs. Peninsular Co., 17 L. R. A. 52.

IV

THE "LOOK AND LISTEN" DOCTRINE IS NOT APPLICABLE HERE.

Our own court has frequently held that the rule which applies to the traveller approaching a railroad crossing does not apply to one crossing a *street* railroad at the usual crossing place.

Morris vs. Seattle, R. & S. Ry., 66 Wash. 696.

Roberts vs. Spokane St. Ry., 23 Wash. 325-35.

Travers vs. Spokane St. Ry., 25 Wash. 237.

Burien vs. Seattle Elec. Co., 26 Wash. 612.

Chisholm vs. Ry. Co., 27 Wash. 240.

V

EXCEEDING THE SPEED LIMIT IS NEGLIGENCE *PER SE.*

O'Brien vs. Water Power Co., 71 Wash. 693.

Wilson vs. P. S. E. Co., 52 Wash. 522.

Travers vs. Spokane St. Ry., 25 Wash. 225.

Engelker vs. S. E. Ry., 50 Wash. 196.

VI

FAILURE TO RING THE BELL IS NEGLIGENCE *PER SE.*

> "If a motorman assumes to drive his car at an excessive speed, he cannot be excused from his duty to ring his bell and give such warning as is commensurate with increased hazard, for it is the measure of due care."
>
> *Peterson vs. Seattle Elec. Ry.,* 72 Wash. 351.

The fact that plaintiff's attention was necessarily fixed closely upon his work is an important element in determining the question of his negligence in omitting to watch constantly for approaching cars.

> *Grant vs. O-W. R. & N. Ry. Co.,* 54 Wash. 678-84 et cit.

A close examination of the numerous cases cited by the defendant in its exhaustive brief fails to find support in the authorities cited for its contentions here. In each case, the facts plainly distinguish it from the case at bar. Either elements here found were there lacking or the reverse is true.

In the important citation, *Kieley vs. S. E. Co.,* 139 Pac. 197, a late Washington case, the important distinction, on which the very case turned, was the fact that

"a repeating gong upon the car was sounded and continued ringing for a distance of from 75 to 200 feet before it reached respondent. The evidence upon this point, which is without practical dispute, is so overwhelming that it disposes of any contention of negligence by reason of appellant's failure to give warning of the approaching car."

Here, the motorman himself only claims to have rung his gong between 20 and 30 feet before he reached the plaintiff (173), while the five men present, Kgogh, Kumpf, Hanson, Kroon and Schlief say it did not ring until within 6 to 12 feet of him. Even the motorman confessed to negligence, in that regard. He saw the plaintiff while 600 to 800 feet distant. (173).

Other cases cited are as easily distinguished.

VII

THE EMPLOYERS LIABILITY ACT DOES NOT APPLY.

Plaintiff was injured by the St. Ry. Co.—a person not in the same employ—and away from the "plant" of his master, Krogh & Jesson.

The Act does not pretend to cover such cases. At best it leaves it to him to elect which he shall

hold responsible—the company or the state. He made due election and gave due notice of it to the state. See exhibits E, F, and G. (84).

This court has expressly determined this question in *Meese vs. N. P. Ry. Co.,* 211 Fed. 254, and so clearly that it is not subject to argument.

VIII

NO "WARRANT" WAS EVER ISSUED BY THE STATE NOR ACCEPTED BY THE PPLAINTIFF.

Defendant employs a large space to argue upon the effect of the receipt and acceptance of "checks" or "warrants" for damages from the State Industrial Insurance department.

It is sufficient to say that the evidence does not support its contention. No "warrant" was ever issued by the state nor received by the plaintiff. The papers miscalled "warrants" were mere proofs of claim and vouchers for monthly indemnity which had been sent him by the State and which had to be executed by plaintiff and returned to the State before the *warrants* would be issued. As he declined to execute them they were mere waste papr. This clearly appears by inspection of Exhibits E, F and G. He promptly notified the State of his election and refusal to take under the State Indemnity law. (84).

IX

NO ERROR IN THE CHARGE

The numerous requests to charge are not applicable to the facts proved. The charge as a whole fairly and correctly states the law of the case. It is even more favorable to the defendant than it had a right to ask. And upon the facts as found, the jury determined in favor of the plaintiff.

Instruction V. was of course accompanied by the other instructions given by the court and based upon the proved and admitted fact that the plaintiff was injured by being struck by the car of defendant. If that car was running at an unlawful rate of speed, and without warning of its approach, these facts were in themselves negligence, which imposed upon the defendant, under those understood conditions, the duty to show by a preponderance of the evidence, that the injury was proximately caused by the contributory negligence of the plaintiff. The instruction is correct.

There is no error in the record and the verdict should not be disturbed.

Respectfully submitted,

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